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Office-Supreme Court, U. S.
FILED
JUN 10 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 119

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SELENE R. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

and

SUPPORTING BRIEF.

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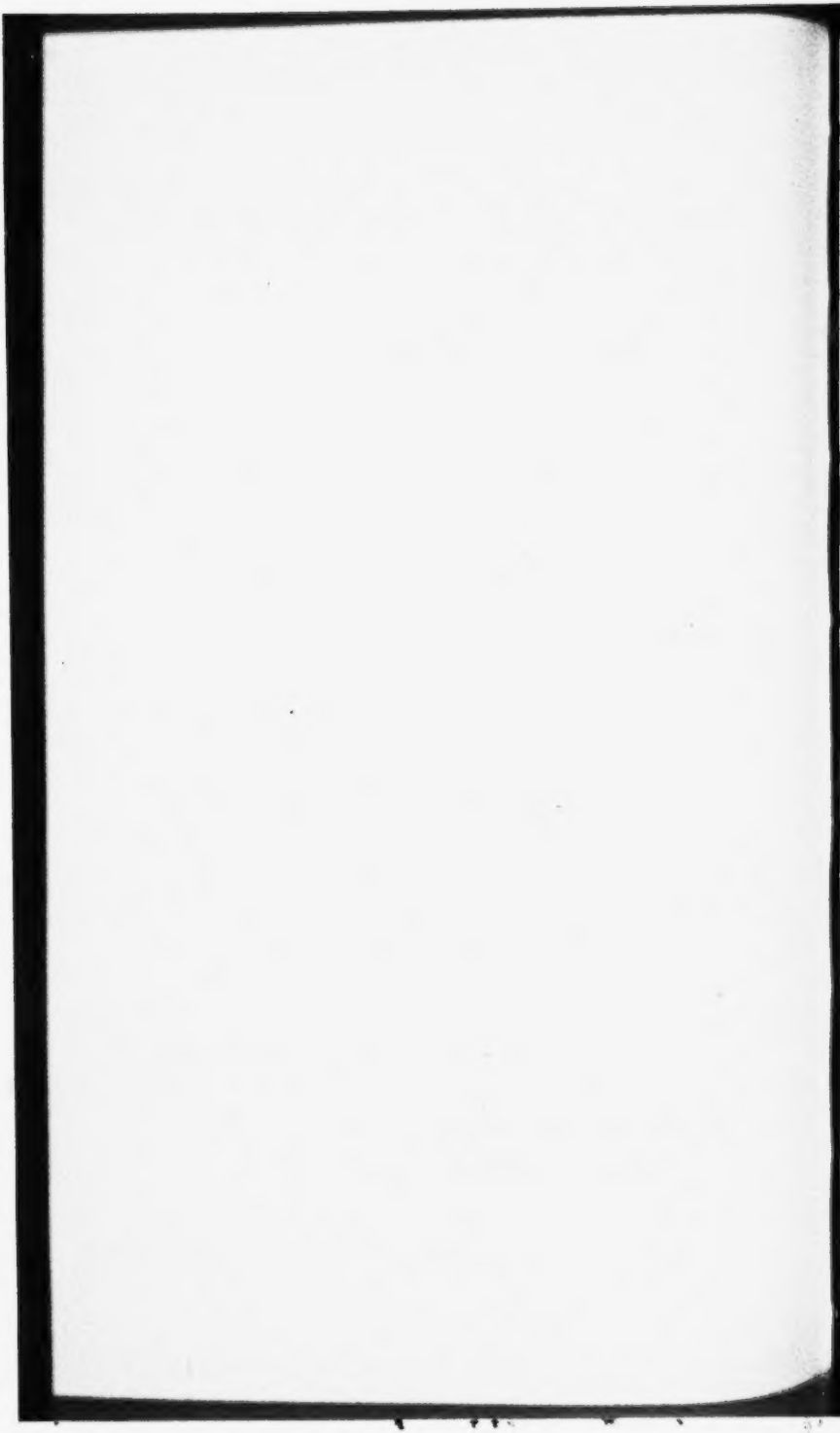

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SELENE R. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your Petitioner shows unto this Honorable Court as follows:

1.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

1. Case No. 6598 was filed by Petitioner, Massachusetts Mutual Life Insurance Company, in the United States District Court on October 17, 1950 (R. 2-12). No. 6607, seeking recovery for the face amount of policies No.

1129980-81, issued by Petitioner, was instituted by Respondent, Selene R. Smith, in the State Court on October 31, 1950, and was removed to the District Court (R. 14-21). On pre-trial hearing the cases were consolidated, the latter case being treated as a counterclaim to the complaint in the former (R. 22-24). Case No. 6598 is a bill for Declaratory Judgment,[1] wherein Petitioner seeks a declaration that said policies issued by it to Sumpter Smith have matured as death claims subject to the terms thereof, including the "Exclusion of Aviation Hazard" provisions of each policy (R. 4), to the effect that liability of the Petitioner under said policies would be limited to the reserve if the insured's death

> "shall have resulted **directly** or **indirectly** from operating, or being in or on, or riding in, any kind of aircraft, whether as a passenger or otherwise."

2. Motions to dismiss were overruled and answers were not required in view of the statement of issues on pre-trial (R. 22-24).

3. At the close of the evidence Petitioner moved for a directed verdict (R. 189-195), the Court reserving a ruling thereon (R. 188). The case was submitted to the jury on special interrogatories (R. 284-285), which interrogatories and answers made by the jury are as follows:

> 1. Is the insured, Walter S. Smith, dead? Yes.
>
> 2. Did the insured's, Walter S. Smith, death result directly or indirectly from being in or on, or riding in any kind of aircraft, whether as a passenger or otherwise? No.
>
> 3. Upon what date did the insured, Walter S. Smith, die? January 24, 1944.

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[1] On a bill for declaratory judgment filed by Petitioner on August 7, 1944, the verdict of the jury was in its favor. The Fifth Circuit reversed the case (167 Fed. 2d 990), holding that the trial Court erred in directing the jury to find that the insured was dead, and further that the bill for declaratory relief was prematurely filed. Cert. denied, 335 U. S. 830, 93 L. Ed. 383.

A verdict was directed as to Interrogatory No. 1 (R. 207). The Court's Findings and Judgment was entered on March 27, 1951 (R. 285-288).

4. Petitioner filed Motions for Judgment, notwithstanding the verdicts (R. 289-290) and Motion for New Trial (R. 296-305), both motions being overruled (R. 306).

5. Petitioner appealed. On November 23, 1951, the Circuit Court of Appeals, Fifth Circuit, reversed and rendered the case (R. 322-326). Respondent filed petition for rehearing (R. 328-333). The petition was granted (R. 339-343), Strum, C. J., dissenting. Petitioner then filed application for rehearing (R. 345-349). This application was denied (R. 350-352). Strum again dissenting.

6. At the time these policies were issued the insured, Walter Sumpter Smith, was an air officer in the Alabama National Guard. The insured was a Lieutenant Colonel in the Air Corps at the time of his disappearance and was traveling under secret orders (R. 262-263, Ex. 21).[2] He left Washington, D. C., on January 18, 1943 (R. 164), in company with Major Barringer (R. 165), who was also lost on the plane[3] (Ex. 26), which disappeared on January 24, 1943. This plane was a C-47 Land Plane (R. 85). It left Borinquen Field, Puerto Rico, at 6:30 A. M.—1230 GMT[4]—in route to Waller Field, Trinidad (Ex. 46). The pilot had been directed to fly a direct course at nine thousand feet altitude (Ex. 39) and when last seen was flying at an altitude of eleven hundred feet (Ex. 36), Respondent's witness Jennings testifying on cross-examination as follows (R. 85, 86):

> "Q. If a man was ordered to fly at 9000 feet and he was last seen flying at 1100 feet in the area of a storm,

---

2 War Department's records begin with Plaintiff's Exhibit 20 and end with Exhibit 61, page 93.

3 Barringer v. Prudential, 62 F. Supp. 286, 153 Fed. (2d) 224 (3).

4 Erroneously referred to by Judge Kirkpatrick in the Barringer case as 12:30 P. M.

what would that indicate to you? A. That would indicate to me that he was taking evasive activity to dodge the storm."

• • • • • • • •

"Q. Would it indicate anything to you that a man who was ordered to fly at 9000 feet when 200 miles out of Trinidad was last seen flying at 1100 feet? A. It would indicate to me that he was having some sort of trouble or first I might say he might have reasons for varying his flight plan. He might be sightseeing."

The plane was due to arrive at Waller Field four hours and three minutes later—1633 GMT (Ex. 46). A bad weather front was encountered approximately 150 to 200 miles north of Trindid. A weather contact pilot reported to Borinquen Field that there was an area of cumulus showers with two stratus decks 380 miles south of Borinquen Field (Ex. 52, pages 74 and 75). It was last seen entering a cloud bank at 14° latitude and 64° longitude (Ex. 46-A, Ex. 22, page 74)—two hours and thirty minutes later —1500 GMT—which was approximately 380 miles from point of departure and 260 miles from Waller Field (Plaintiff's Ex. B-1). The plane was without life preservers or food and had only one small rubber raft capable of holding but a few of the plane's nine occupants (Ex. 38 and Ex. 52, page 75), witness Jennings further testifying (R. 88):

"Q. If the plane landed, it was forced down and landed and made what you call a ditch landing, how long would a C-47 stay afloat? A. I would say under reasonable conditions it would sink in a matter of minutes."

• • • • • • • •

"Q. If you didn't have a life jacket you would have to get into a boat right away? A. Yes."

The area was combed in vain for wreckage. On January 27, 1943, Morrison Field reported that Borinquen had abandoned search and that the personnel was "missing non-battle" (Ex. 24). On March 4, 1943, Respondent was notified by wire from the Adjutant General that her husband "died January 24 in Latin American area as a result of airplane accident" (R. 257). There was a complete review of the matter by the War Department (Ex. 52) and an extended report with a determination of status of the crew and passengers, recommending, among other things, that the status of personnel be determined as "died 24th January, 1943" (Ex. 52, page 76). On the 30th of June, 1943, following this review, the Adjutant General's department directed that "casualty reports will be initiated, stating that the following persons (including the insured), died in an aircraft accident (non-battle) on January 24, 1943, on a flight from Borinquen Field, Puerto Rico, to Waller Field, Trinidad" (Ex. 50).

Respondent did not question the correctness of the War Department records (R. 185). On the 2nd of November, 1943, she filed her sworn petition in the Probate Court to Probate the Will of her husband (R. 271-274), averring therein that he "departed this life at (in) Latin American area of the Atlantic Ocean on or about January 24, 1943." Letters were granted on February 22, 1944 (R. 275). In November, 1943, she filed proofs of death with Petitioner, Protective Life and Prudential. The one filed with Petitioner (R. 101, Plaintiff's Ex. 7) recites:

"3. (a) Date of Death.	(a) January 24, 1943.
(b) Place of death, Caribbean	(b) Unknown (theatre of war)."

The proof filed with Prudential (R. 32, Plaintiff's Ex. 1) recites:

"5. (a) Date of Death. As by War Department notice January 24, 1943.

(b) Place of death. Caribbean theatre of war.

(c) Cause of death. Presumed to be and declared U. S. Govt. **from falling aircraft.**"

The Protective proof (R. 43, Plaintiff's Ex. 11) recites:

"3. (a) Source from which date of death obtained?

(a) War Department notice of death.

4. (a) Date and place of death. (a) Death 1/24/43. Place in theatre of war (Caribbean).

5. (b) Cause of death. (b) **Plane accident** as per U. S. Government."

Immediately after filing proofs with the Protective and Prudential Insurance Companies, Respondent began collecting the death benefits on those policies (R. 172).

On December 15, 1943, Respondent wrote Petitioner requesting a refund of premiums paid by her personally on the policies sued on since January 24, 1943 (R. 276-277). Shortly after receipt of Proof of Death from her, Petitioner tendered her the reserves due on the policies, less indebtedness. There was also tendered the premiums paid subsequent to January 24, 1943. She refused these tenders (R. 277-278).

2.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under **28 U. S. C. A., Section 1254.**

3.

QUESTIONS PRESENTED.

The petition involves the following questions:

1. Whether Petitioner met the burden of proof that the insured's death resulted directly or indirectly from being in or on or riding in any kind of aircraft.

2. Whether the Respondent would be entitled to recover if the plane on which the insured was riding was shot down by an enemy submarine.

3. Whether the Respondent would be entitled to recover if the plane on which the insured was riding fell into the sea and the insured escaped to an uninhabited island.

4. Whether death resulting from a hazard of war while the insured was riding in a plane was a risk excepted from the "Exclusion of Aviation Hazard" provision of the policies involved.

5. Whether Petitioner was entitled to either (a) the affirmative instruction, (b) a directed verdict, or (c) a judgment notwithstanding the verdict on the issue of whether insured's death resulted directly or indirectly from riding in an airplane.

6. Whether the Petitioner was entitled to a judgment notwithstanding the verdict fixing the date of the insured's death as of January 24, 1944.

7. Whether the petitioner was entitled to a new trial.

8. Whether the Court of Appeals erred in sustaining the Trial Court in charging the jury on a supposed or conjectural state of facts.

9. Whether evidence of the flight of a shell damaged B-24 patrol bomber a month previous to the flight of the plane here involved was admissible.

10. Whether evidence as to what happened to a British plane flown by witness Jennings on a flight a month previous when it ran into bad weather approaching Trinidad was admissible.

11. Whether testimony of a witness relating to his experiences surrounding a forced landing in the Caribbean area on a flight more than thirty days before the flight of the plane here involved was of evidential value.

12. Whether testimony of a witness that he flew back from Rio de Janeiro six months previous to the flight of the plane here involved because there was little shipping available and was it highly dangerous, was admissible.

13. Whether evidence as to ship sinkings in the various submarine areas of the world beginning six months previous, and in the Caribbean area beginning seven months previous, to the time of the disappearance of the plane here involved, was admissible.

14. Whether a witness' testimony as to ship sinkings, none of which occurred after November, 1942 (the plane involved having disappeared on January 24, 1943), was admissible.

15. Whether the Trial Court erred in refusing to strike the entire testimony of the Respondent's witness Jennings as relating to another occurrence too far removed in point of time and as being without materiality, relevancy or competency on the issues being tried.

16. Whether the Trial Court erred in refusing to exclude the entire testimony of the Respondent's witness Sensabaugh as confusing the jury and as being without

competency, relevancy, materiality or legality on the issues involved.

17. Whether the instant case is in conflict with the holding in **Barringer v. Prudential Insurance Company, 153 Fed. 2d 224 (3), 62 Fed. Supp. 286,** involving a fellow passenger with the insured.

18. Whether the decision of the Court of Appeals in holding that if the plane on which the insured was riding was shot down by an enemy submarine, or if the insured reached the water and made his way to a nearby uninhabited island, where he died of disease or starvation, was contrary to the jury's verdict finding that the insured died on January 24, 1944, a year following his disappearance.

19. Whether the holding of the Court of Appeals that if the plane on which the insured was riding was shot down by an enemy submarine, is in error in that it reads out of the policy provisions the word "indirectly," where the same appears in the clause "if such death shall have resulted directly or indirectly from . . . riding in any kind of aircraft."

20. Whether the verdict of the jury finding that the insured's death did not result directly or indirectly from riding in an airplane, conflicts with its verdict fixing the date of the insured's death on January 24, 1944, one year after his disappearance.

21. Whether the Court of Appeals, in the absence of a war risk exception, was justified in engrafting into the Aviation Exclusion Provision an implied war risk exception.

22. Whether the opinion of the Court of Appeals is erroneous and contrary to the evidence and established principles of law applicable thereto.

23. Whether the Court of Appeals erred in affirming the Trial Court.

24. Whether the Court of Appeals erred in granting Respondent's petition for rehearing and whether that Court erred in refusing to grant Petitioner's petition for rehearing.

4.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Petitioner says that the decision of the Court of Appeals for the Fifth Circuit:

1. Is in conflict with the decision of the Third Circuit involving a fellow passenger on the plane with the insured.

Barringer v. Prudential Insurance Company, 153 Fed. 2d 224, affirming and adopting opinion in 62 Fed. Supp. 286.

2. In holding that Petitioner (a) had not met the burden of proof, (b) was not entitled to the affirmative instruction, (c) was not entitled to a directed verdict, or (d) was not entitled to a judgment notwithstanding the verdict, is each in conflict with the decision of the Third Circuit on the issue of whether the insured's death resulted directly or indirectly from riding in an airplane.

Barringer, 1 Supra.

3. In holding that if the plane on which the insured was riding was shot down by an enemy submarine, Respondent would be entitled to recover, is in conflict with the decisions of the Court of Appeals of the First, Third and Sixth Circuits and of the District of Columbia.

Green v. Mutual Ben. Life Ins. Co., 144 Fed. (2d) 55 (1);

Wilmington Trust Co. v. Mutual Life Ins. Co., 177 Fed. (2d) 404 (3), Aff. 76 F. Supp. 560, Cert. den. 94 L. Ed. 1351;

Burns v. Mutual Ben. Life Ins. Co., 179 Fed. (2d) 236 (6), Aff. 79 F. Supp. 847, Cert. den. 94 L. Ed. 1362;

United Services Life Ins. Co. v. Bischoff, 181 Fed. (2d) 627 (App. D. C.).

4. In holding that death resulting to one from a hazard of war, namely, gunfire from an enemy submarine, while riding in an airplane, was excepted from the policy provision that there should be no liability (other than for reserves) if death resulted directly or indirectly from riding in an airplane, is in conflict with the decisions of the Court of Appeals of the First, Third and Sixth Circuits and of the District of Columbia.

Decisions 3, Supra.

5. In holding that a hazard of war is not excluded by the aviation clause, thereby impliedly engrafting a war risk exception on said clause, is in conflict with the decisions of the Court of Appeals of the First, Third and Sixth Circuits and of the District of Columbia.

Decisions 3, Supra.

6. In holding that if the plane on which insured was riding was shot down by an enemy submarine Respondent would be entitled to recover, is in conflict with the decision of the Tenth Circuit, construing the language, "death resulting directly or indirectly" as employed in life insurance contracts.

Mandles v. Guardian Life Ins. Co., 115 Fed. 2d 994 (10).

7. In holding that if the plane on which the insured was riding was shot down by an enemy submarine, or if the plane fell, sank, was never heard of, and insured made

his way to one of the nearby uninhabited islands where he died of starvation, Respondent would be entitled to recover

(a) Is in conflict with the decisions of the Sixth, Eighth, Tenth and other Circuits, and of this Court, holding that a jury's verdict cannot be based on conjecture, surmise or speculation.

Goodall Company v. Sartain, 141 Fed. 2d 427 (6);
Westland Oil Company v. Firestone Tire and Rubber Company, 143 Fed. 2d 326 (8);
Franklin v. Skelly Oil Company, 141 Fed. 2d 568 (10);
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, and

(b) Is in conflict with the applicable local decisions holding that verdicts cannot rest on supposition, surmise, guess, speculation or conjecture.

Griffin Lumber Company v. Harper, 247 Ala. 616, 25 So. 2d 505;
Atlantic Coastline R. Co. v. Weatherington, 245 Ala. 313, 16 So. 2d 245;
Cannon v. Louisville & Nashville Railroad Co., 252 Ala. 571, 42 So. 2d 340.

8. In sustaining the trial court in allowing proof relating to other facts and transactions, removed in point of time and occurring under different conditions

(a) Is in conflict with applicable local decisions holding that to allow such proof conditions must be substantially the same and not involve collateral issues.

So. Ry. Co. v. Lefan, 70 So. 249, 195 Ala. 295;
St. Louis-S. F. Ry. Co. v. Curtis, 113 So. 54, 216 Ala. 296;
S. H. Kress v. Barrett, 147 So. 386, 226 Ala. 455;
L. & N. Ry. Co. v. Finlay, 185 So. 904, 237 Ala. 116, and

(b) Is in conflict with the decision of the Third Circuit.

Continental Life Ins. Co. v. Searing, 240 Fed. 653 (3).

9. In holding that Petitioner had not met the burden of proof on the issue of whether insured's death resulted from riding in an airplane, has failed to give weight to competent evidence (and reasonable inferences therefrom) that the insured so came to his death and has given weight to incompetent evidence relating to other facts and transactions, removed in point of time and occurring under different conditions and (a) has thereby so far departed from the accepted and usual course of judicial proceedings, and (b) has so far sanctioned such a departure by the trial court, as to call for this Court's power of supervision.

10. In holding that there was competent evidence sufficient to constitute a conflict on the issue of whether the insured's death resulted from a cause other than riding in an airplane, has given weight to incompetent evidence relating to other facts and transactions, removed in point of time and occurring under different conditions and (a) has thereby so far departed from accepted and usual judicial proceedings, and (b) has so far sanctioned such a departure by the trial court, as to call for this Court's power of supervision.

Wherefore, it is respectfully prayed that this Petition be granted and that a Writ of Certiorari be issued and directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the records in all proceedings in the case numbered and entitled on its docket No. 13,685, **Massachusetts Mutual Life Insurance Company, Appellant, v. Selene R. Smith, Appellee,** to the end that judgment and opinion of said Court of Appeals, and of the Dis-

trict Court, may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as may seem meet and just.

Harlan Hobart Grooms

HARLAN HOBART GROOMS,
Counsel for Petitioner, Massachusetts Mutual Life Ins. Co., a Corporation.

SPAIN, GILLON, GROOMS & YOUNG,
Birmingham, Alabama,
Of Counsel.

The undersigned hereby certifies that he has served a copy of the foregoing Petition upon the Hon. James A. Simpson, Attorney of Record for Respondent.

This the 4 day of June, 1952.

Harlan Hobart Grooms

Harlan Hobart Grooms,
Attorney for the Petitioner.

BRIEF IN SUPPORT OF PETITION.

1.

OPINIONS BELOW.

The original opinion and the opinions on the first application for rehearing of the United States Court of Appeals for the Fifth Circuit are reported in 193 Fed. 2d 511 (R. 322-326 and 339-343). The opinions on second application for rehearing are reported in 194 Fed. 2d 1006 (R. 350-352).

2.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254.

3.

STATEMENT OF THE CASE.

The principal facts are set forth in the Petition under "Summary Statement of the Matters Involved" and particularly in paragraph 6 thereof. To avoid repetition the statement of the case there made is here adopted.

4.

QUESTIONS PRESENTED.

A statement of the questions presented is set forth in the Petition under "Questions Presented." To avoid repetition same is here adopted.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

1. In affirming the trial court.

2. In affirming the trial court in denying to Petitioner the following, separately and severally:

(a) The affirmative instruction (Charge 4, R. 297. Charge 5, R. 298 and 214. Charge 6, R. 298. Charge 10, R. 299).

(b) A directed verdict (R. 189-192).

(c) A judgment notwithstanding the verdict (R. 289-293 and 306).

(d) A new trial (R. 296-306).

3. In holding that Petitioner had not met the burden of proof.

4. In holding that if the plane on which insured was riding was shot down by an enemy submarine Respondent is entitled to recover.

5. In sustaining the trial court in instructing the jury orally (R. 203, 205 and 210) and in writing (Charge 10, R. 301, 219, Charge 12, 302, 217 and Charge 16, R. 303 and 219) that if the insured's death resulted from enemy gunfire Respondent would be entitled to recover.

6. In holding that if the plane on which insured was riding fell into the sea and the insured escaped to an uninhabited island Respondent is entitled to recover.

7. In holding that a hazard of war is a risk excepted from the aviation rider.

8. In sustaining the trial court in charging the jury on a proposed or conjectural state of facts (Charge 9, R. 301, 218, Charge 15 R. 302, 219).

9. In sustaining the trial court in overruling Petitioner's motion to strike the testimony of Respondent's witness Jennings (R. 61-88, 89).

10. In sustaining the trial court in overruling Petitioner's motion to exclude the testimony of Respondent's witness Sensabaugh (R. 136-152, 153).

11. In sustaining the trial court in overruling Petittioners motion to exclude the answer of Respondent's witness Jennings, as to the flight of a shell damaged B-24 between Christmas and New Year of 1942 (R. 69).

12. In sustaining the trial court in overruling Petitioner's objections to the question directed to Respondent's witness Jennings concerning what happened to witness's plane when it ran into bad weather as it approached Trinidad on December 22, 1942 (R. 73).

13. In sustaining the trial court in overruling Petitioner's objections to the question directed by Respondent to her witness Jennings, as follows:

> "I will ask you whether or not in your experience in flying these C-47's you ever saw any one of these ships that was beaten down or caused to fall by running into a storm?" (R. 79).

14. In sustaining the trial court in overruling Petitioner's motion to exclude the testimony of Respondent's witness Jennings relating to certain experiences of the witness in the Caribbean area and particularly his experiences surrounding a forced landing on December 22, 1942 (R. 61-81, 82).

15. In sustaining the trial court in overruling Petitioner's objection to the question and its Motion to exclude the answer of Respondent's witness Sensabaugh that he flew back from Rio de Janeiro in July 1942, because

"very little shipping was available, and it was highly dangerous" (R. 134).

16. In sustaining the trial court in overruling Petitioner's objections to the question propounded by Respondent to her witness Sensabaugh as to the number of ship sinkings in the various submarine areas of the world beginning with the month of July, 1942 (R. 135-136).

17. In sustaining the trial court in overruling Petitioner's objections to the questions (and subsequent question of like import) propounded by Respondent to her witness Sensabaugh as to the number of ship sinkings in the Gulf sea frontier, Caribbean frontier, and Atlantic area beginning in June, 1942 (R. 140-143).

18. In sustaining the trial court in entering judgment for Respondent on her counterclaim (R. 285-288).

19. In sustaining a verdict based upon supposition, surmise, guess, speculation and conjecture.

20. In holding that **Barringer v. Prudential Ins. Co., 153 Fed. 2d 224 (3), 62 F. Supp. 286,** is distinguishable from this case.

21. In failing to render a judgment for Petitioner notwithstanding the verdict.

22. In granting Respondent's petition for rehearing (R. 334-341) and refusing to grant Petitioner's petition for rehearing (R. 345-352).

23. In rendering an opinion contrary to the evidence and established principles of law.

ARGUMENT.

(a) The decision of the Appellate Court is in direct conflict with that of the decision of the Third Circuit in Barringer v. Prudential Insurance Company, 153 Fed. 2d 224, 62 F. Supp. 286.

The insured, Col. Sumpter Smith, was a fellow passenger with Major Lewin B. Barringer (R. 165), and was lost with him on the plane (Ex. 26).

The aviation rider in the **Barringer** case provided that if the insured's death

> "shall have resulted from riding in any kind of aircraft . . . the liability . . . shall be limited to the net reserves."

The rider here involved provides that liability is limited to reserves if the insured's death

> "shall have resulted **directly or indirectly** from operating, **or being in or on, or riding in,** any kind of aircraft."

In the **Barringer** case the Court summarized the facts as follows:

> "The facts surrounding the insured's death are as follows:
>
> "At 12:30 p. m. on January 24, 1943, the insured, who was a major in the United States Army and a glider expert, boarded an Army C-47 airplane (a land plane) at Borinquen Field, Puerto Rico. The plane was piloted by an Army Lieutenant with a co-pilot and was under orders to fly direct to an airfield on the northeastern tip of Trinidad. A direct flight from Borinquen Field to Trinidad would be entirely over open sea with possibly one or two very small islands

near the route. The plane left the field, and neither it nor any of its occupants have ever been seen or heard of since. I think this evidence is sufficient to support a finding that the insured's death resulted from riding in an airplane, and I so find."

The Court then concluded:

"Various more or less fantastic explanations of disappearance of plane and passengers might be suggested but, with practically no land on the direct route to Trinidad, I do not see how there could be much doubt in the mind of any reasonable person that it came down in the sea. At any rate it is not necessary to preclude all other possibilities.

"If the plane fell into the sea then, again, the reasonable, probable and almost necessary conclusion, from the nature of the accident, is that the insured's death resulted from riding in an airplane. Again, there are possible theories which might account for his death otherwise as, for example, gunfire from a German submarine, but they are remote. Certainly, if it be taken as established that, having been riding in an airplane which fell into the sea and was lost with all on board, the insured is dead, it seems to me that it is not only permissible but reasonable and logical to conclude that he met his death as a result of riding in an airplane.

"I conclude as a matter of law that the plaintiff is not entitled to receive the face value of the policy but that she is entitled to recover the amount of the net reserve with interest."

In its original unanimous opinion (R. 322-326) the Court said:

"This same aviation hazard was involved in **Barringer v. Prudential Ins. Co.**, 62 Fed. Supp. 286. There the case was submitted to the court without a jury;

there the evidence was held sufficient to support a finding that the insured's death resulted from riding in an airplane, and the court so found. The same issue was submitted to a jury in this case, but the jury made a contrary finding. The question here is not whether the evidence would have supported a finding that death resulted from riding in an airplane, but whether it will support a finding that death resulted from any other cause. Consequently, there is no conflict between our decision in the case at bar and the court's decision in **Barringer v. Prudential Ins. Co.**, supra."

On its first opinion on rehearing the majority stated (R. 340):

> "The case of **Barringer v. Prudential Insurance Company**, 62 Fed. Supp. 286, was not decided on full evidence, but on a presumption arising from pleadings and statements of counsel."
>
> • • • • • • • •
>
> "On reconsideration, we cannot say as a matter of law that the insurer has met its burden in this case."

The Court in the **Barringer** case "concludes as a matter of law" that the insurer met the burden of proof and that plaintiff was entitled to recover the reserves only. In this case the Court states that it could not say "as a matter of law" that the insurer had met the burden of proof.

The facts in this case confirm the conclusion in the **Barringer** case and should not lead to a directly opposite result. The Court says that there was here a controversy as to whether the plane was ever seen after take-off. Respondent so contended on application for rehearing (R. 328-333). If the plane was never again seen, then the facts as to that question are identical with those recited in the **Barringer** case. The Court says that it was within the province of this jury to disbelieve the report that the plane

when last seen was flying at 1,100 feet when it had been directed to fly at 9,000 feet and also the facts as to the weather conditions did not indicate much of a storm (R. 340). In its opinion on second application (R. 351-352) the Court said that the reports were based on hearsay which went to their credibility. Assume the ultimate, that the jury disbelieved every War Department report, then we are right back on the identical facts upon which the **Barringer** case was decided. If the jury disbelieved the reports the fact that there might be contradiction in the reports would be of no consequence.

If the reports are true then Petitioner established by evidence that the plane disappeared under circumstances amounting to a specific peril—an **assumption** upon which the **Barringer** decision is predicated. To deny recovery on the **assumption** of disappearance under conditions of peril, as in the **Barringer** case, and to grant recovery in face of **proof** of disappearance under conditions of peril, as in this case, leads to an irreconcilable and absurd conflict.

In its first opinion on application for rehearing (R. 339-341) the Court adopts Respondent's theory of possible death from enemy submarine fire or from starvation on a nearby uninhabited island. His Hon. Judge Strum, in his dissenting opinion, has characterized the first mentioned theory as "both fanciful and speculative," and the latter as "more fanciful than real." In the **Barringer** case the Court refers to the theories as "more or less fantastic." The jury could not have accepted any such theories. Their verdict as to the date of the insured's death proclaims their disbelief. The plane disappeared on January 24, 1943. The jury found, by separate finding (R. 286), that the insured met his death on January 24, 1944—one year later. The Court's adoption of the theory of death by submarine gunfire is wholly inconsistent with the jury's verdict. The insured simply could not have been shot out of the sky on January 24, 1943, and have lived for a whole year.

There is no evidence that a submarine fired on this plane, or that there was a submarine in the area. Apparently the Court's holding as to the possible presence of submarines was based upon the testimony of Sensabaugh and Jennings. Sensabaugh produced upon the trial of the case a book entitled "Naval Operations of World War II" by Samuel Morrison, purporting to show the number of ship sinkings in the various submarine areas into which the world was divided (R. 135). This record failed to show a single sinking in the Caribbean area in December, 1942, or during the first five months of 1943 (R. 142-145, 152). The witness stated that sinkings had dropped everywhere in January, 1943 (R. 144); that the submarines may have been called in (R. 145); and that submarines tried to avoid airplanes, which were superior weapons (R. 146). The concurring opinion of Judge Rives refers to the damage to a submarine patrol bomber. In the first place, Jennings was not on that plane and his information was second hand hearsay. Secondly, he said he saw the plane between Christmas and New Year's 1942 on Waller Field, Trinidad—250 miles South of where the C-47 disappeared. He was asked the question (R. 69):

> "Do you know what course that plane had taken?"

His answer was:

> "No, sir. It was on flying patrol. It was an armed flying patrol."

There simply is no competent evidence whatever of the presence of submarines in the area where the plane disappeared on January 24, 1943. Respondent's witness, Dreyfus, who also flew the Caribbean route, testified on cross-examination as follows (R. 161):

> "Q. Did you ever see a submarine any time you were crossing that area? A. No, sir."

Did Col. Smith's plane fall into the sea in such a manner as ot permit him to escape to a nearby uninhabited island? In the absence of the War Department records the Court is guessing merely that the plane disappeared **near** an uninhabited island. The War Department records reveal that the plane was last seen at latitude 14°, longitude 64°. There is no **nearby** island at that point. The plane had been directed to fly a direct course (Ex. 39). When last seen it was on that course. A line drawn on the map (see map, Pl. Ex. B-1) on a direct course from Borinquen to Waller practically interecpts the crossing of latitude 14° and longtitude 64°. It is open sea until the inhabited island of Grenada is reached. Respondent's witness Jennings, testifying further on cross-examination, stated (R. 84):

> "Q. The closest island along that line is a little island called Avis Island? A. I don't recall.
>
> Q. You see that on the map. How far is that away? A. 60 to 80 miles away.
>
> Q. You see no island then until you get to the Island of Grenada just outside of Trinidad and that is the island that is marked 'Grenada'. That is right, isn't it? A. Yes."

The Reviewing Board (Ex. 52, p. 75), said:

> "The nearest land would be one of the Caribbean islands, the closest being either Trinidad, Grenada or St. Vincent's. All these British possessions are well inhabited and civilized communities. The presence of castaways on their coasts would not long remain unreported."

There simply are no islands **on** or **near** the route except the inhabited islands referred to. This Caribbean area was the first discovered and is the oldest settled part of America. Every island is charted. Respondent's witness Dreyfus, on cross-examination, testified (R. 161):

"Q. All of those larger islands on that map are all through that chain inhabited islands, aren't they? A. So far as I know they are.

Q. You can't get very far away from an inhabited island as long as you are on any island down there? A. You mean——

Q. If you are on any island in this chain, even though that particular island was not inhabited, you would not be very far away from an inhabited island, would you? A. No, sir."

The jury did not believe this theory of escape and starvation. By its separate verdict it found that Col. Smith died on January 24, 1944, a year after his disappearance. There are two maps in evidence, but no one has ever pointed to any uninhabited island anywhere in the area. An island that could sustain life for man, wholly without supplies for a year, would very likely be inhabited, or at least visited once in twelve months.

The decision in the **Barringer** case represents the unanimous opinion of Circuit Judges Goodrich, McLaughlin and O'Connell. The original opinion in this case was unanimous (R. 322). The present opinion is not (R. 341). Judge Strum dissents. Four Circuit judges say that there should be no recovery. Two, reversing themselves, say that there should be. The finding of the Status Review and Determination Section, constituted under **Title 50, App. Sec. 1005**, is opposed to the view of the present majority in this case (Ex. 20, p. 74, paragraphs 16-20). The original opinion and Judge Strum's dissenting opinion are fundamentally sound.

It is submitted that the present majority opinion conflicts with the decision in the **Barringer** case, that Petitioner met the burden of proof, that it was entitled to a directed verdict (R. 189-192), to the affirmative charge

(Charge 4, R. 297, Charge 6, R. 298, Charge 16, R. 299), and to a judgment notwithstanding the verdict (R. 289-293).

(b) **The Court's opinion is in conflict with the decisions of the First, Third and Sixth Circuits and of the District of Columbia on the issue of whether death resulting from a hazard of war is excepted from the aviation clause.**

The trial court charged the jury orally (R. 203, 205, 210) and in writing (Charge 10, R. 301, 219, Charge 12, R. 302, 217 and Charge 16, R. 303, 219) that death resulting from a hazard of war while riding in an airplane was excepted from the aviation clause. The Appellate Court now sanctions that theory of law, holding that "if the plane was shot down by enemy submarines, the Appellee (Respondent) is entitled to recover" (R. 340). Petitioner asserts that there is no competent evidence which sustains Respondent's theory that insured lost his life in that manner. Assuming that there was such evidence the holding is not a correct application of the law.

In **Green v. Mutual Ben. Life Insurance Company**, 144 Fed. 2d 55 (1st), the insured, on April 13, 1943, met his death while engaged in carrier landings. The Court held that the fact that the policy did not include a military risk exclusion clause did not establish that the aviation clause was intended to exclude from coverage only the risks attendant upon civil aeronautics, and not the risks contingent upon military service. The Court said:

> "The company is interested in the risk itself, and is not concerned with the reason for the exposure."

The Court pointed out that the application disclosed that the applicant contemplated training as an airplane pilot. In this case, Col. Smith's policies each contained a special aviation blank application. At that time, he was a flight officer of the Alabama National Guard (Ex. 15).

He did not wish to pay the extra premium for the aviation hazard and the company would not have issued the policy without the aviation rider (R. 251, Answer 7 F).

In **Wilmington Trust Company v. Mutual Life Insurance Company**, 76 F. Supp. 560, aff'd 177 F. 2d 404 (3rd), certi. den., 339 U. S. 931, 94 L. Ed. 1351, the insured was killed in a glider flight. It was contended that since many policies contained "war riders" and that since the policies involved did not contain "war riders," a military flight was excluded. In holding for the insurer, the Court said:

> "There is fallacy to this particular argument. The war rider clause covers many risks other than those of military flight. The inclusion by an insurance company of a war clause has, therefore, a significance independent of the mere exclusion of the risk of death from military flight. The addition of the war rider or clause is consequently not relevant to the interpretation of the scope of the aviation rider here."

In **Burns v. Mutual Ben. Life Insurance Company**, 79 F. Supp. 847, aff'd 179 F. 2d 236 (6th), cert. den., 339 U. S. 947, 94 L. Ed. 1362, the insured who was a flight officer in the Army Air Corps was killed in a plane explosion. It was contended that since the incontestable clause was without a war risk exception, the aviation clause did not include a war risk. The Court, in holding for the insurer, said:

> "The absence of a war-risk exception in the incontestability provision does not operate to engraft an implied war-risk exception on the aviation clause."

The Circuit Court of Appeals of the District of Columbia in **United Services Life Insurance Company v. Bischoff**, 181 F. 2d 627, said:

> "Risks of war are not excepted from this general aviation exclusion clause. Since the exclusion is un-

> qualified it applies equally to all risks, whether of war or of peace, that result from operating or riding in airplanes."

In that case the insured was strafing a locomotive, the right wing of the plane coming into contact with the locomotive as the insured banked away.

Not only does the Appellate Court's present opinion conflict with the foregoing cases, but is in conflict with the majority view on the subject. **17 A. L. R. 2d 1068-69. Janco v. John Hancock Mutuel, 63 Atl. 2d 138 (Pa.); Hyfer v. Metropolitan Life, 61 N. E. 2d 3 (Mass.); Knouse v. Equitable Life, 181 Pac. 2d 310 (Kans.); McKanna v. Cont. Assurance Co., 194 Pac. 2d 515 (Kans.); Durland v. N. Y. Life, 61 N. Y. S. 2d 700, and Thoma v. N. Y. Life, 30 Nort. Co. R. 369 (Pa.), 11 C. C. H. Life Cases 999.**

The Appellate Court has grafted an exception into the aviation clause so that it now provides that the liability of the insurer shall be limited to the reserves

> "If such death shall have resulted directly or indirectly from operating or being in or on, or riding in any kind of aircraft **except death resulting from a hazard of war.**"

Contractual obligations are not changed by a state of war. **N. Y. Life v. Stratham,** 93 U. S. 24. The present opinion of the Appellate Court changes the obligations of the policies here involved.

This matter involves an important issue of insurance law, as to which there is a direct conflict between circuits, and this Court should now adjudicate the matter to prevent further confusion.

(c) The Appellate Court's decision that if the insured met his death from enemy gunfire while riding on the plane, Respondent is entitled to recover, is in conflict with the decision of the Tenth Circuit, construing the language "death resulting directly or indirectly", as employed in life insurance contracts.

It will be noted here that the aviation rider covers death resulting **directly** or **indirectly** from operating or **being in** or **on** or **riding in** any kind of aircraft. In the **Barringer** case the Court held that under the evidence death **resulted**, as a matter of law, from **riding in** an airplane. Here, the effect of the Court's holding is that, under the evidence, death, as a matter of law, neither **resulted directly** or **indirectly** from **being in** or **on** or **riding in** the very same plane.

If it be assumed, and it is, indeed, a far fetched assumption, that a submarine took a pot shot at the plane, and if it be further assumed that the plane was struck by gunfire, by the remotest possibility it can hardly be still further assumed that the fire was directed at Col. Smith, the individual. There would obviously be no way for the gunner to single out Col. Smith or any of the other occupants. The fire was directed at the plane. The risk was **directly** connected with aviation. The plane was in flight. Col. Smith was on the plane. His death was not, therefore, due solely to dangers inherent in a war risk. This case cannot be brought within the influence of **Bull v. Sun Life of Canada**, 141 Fed. 2d 456 (7), where a strafing Zero killed the insured after the plane had come to rest, was anchored and the flight ended. Assuming all the facts for which Respondent contends, Col. Smith's death resulted **directly** or **indirectly** from **being in** or **on** or **riding in** the plane on which he was a passenger. There was no independent, intervening cause not connected with the flight of the plane.

In **Mandles v. Guardian Life,** 115 Fed. 2d 994 (10), the policy had a double indemnity provision, which excluded liability if death resulted "**directly** or **indirectly** from bodily or **mental infirmity**". The insured, a mental patient, thrust her arm through a window pane. The arm was lacerated, as a direct result of which septicemia set in. She died. The question presented was whether death resulted directly and independently from all other causes effected solely through external, violent and accidental means, and not **indirectly** from **mental infirmity.** The Court concluded that death "resulted directly or indirectly from mental infirmity", and that there could be no recovery. Petitioner submits that if death in that case resulted **directly** or **indirectly** from **mental infirmity,** although actually caused by hostile disease germs, the insured's death here resulted **directly** or **indirectly** from riding in a plane, although actually caused by hostile German gunners. The conflict between this case and the **Mandles** case is evident.

(d) **The jury's verdict is based on conjecture, surmise and speculation.**

Either the plane was last seen at latitude 14°, longitude 64°, or it was never seen after take-off from Borinquen Field. Beyond those points everything is conjecture, surmise and speculation. Here we have a land plane (R. 85) on an overwater flight of approximately 650 miles. The plane was without life preservers or food (Ex. 52, pp. 74, 75). If it reached latitude 14°, longitude 64°, it was approximately 380 miles from point of departure and 270 miles from its destination (Plf. Ex. B-1). From that point the nearest land was Aves Island, approximately 100 miles to the northwest and Blanquilla, approximately 150 miles to the southwest. It was then flying at an altitude of eleven hundred feet (Ex. 36), whereas it had been directed to fly at nine thousand feet (Ex. 39). There was a storm

front 380 miles south of Borinquen (Ex. 52, pp. 74, 75) and a bad weather front 150 to 200 miles north of Waller Field, Trinidad (Ex. 37, pp. 52, 74). When last seen the plane was entering a cloud bank (R. 221).

In **United Commercial Travelers of America v. King,** 161 Fed. 2d 108, affirmed 92 L. Ed. 608, Judge Dobie, writing for the court, said:

> "In undertaking an aerial flight over the ocean in a land-based plane, man must reckon with the perils of the sea which are as imminent and real as the unrelenting force of gravity. Just as flight over the land brings forth the danger of violent collision with the earth, we have the dangers of the sea in over-water flight. That men may remain alive for varying periods of time before succumbing does not change the picture . . . Common knowledge and experience fairly shout of the dangers of shock, exposure and drowning when a flight is taken over water in the winter time in a land based plane."

In Mr. Robert A. McLarty's article, entitled **"Res Ipsa Loquitur in Airline Passenger Litigation,"** Section of Insurance Law, American Bar Association, 1950, the following pertinent statement is made:

> "An airplane soaring into the wild blue yonder is subject to the 'perils of the air' even as a vessel embarking upon an ocean voyage is subject to the 'perils of the sea.' The elements of nature which beset aircraft, and which may come singly or in groups, are turbulence, ice, tricky wind currents, unpredictable changes in barometric pressure, down drafts in mountainous terrain, and rain, snow or hail. The C. A. B. statistical reports of 1947 and 1948 show that seventeen accidents were caused primarily by weather in airline transportation. When a plane flies into or near a thunderstorm, all the elements of nature may

be unleashed against it. In addition to the turbulence which rocks the plane about crazily, taxing the skill of the pilot to keep it in level flight, there may be rain, snow or hail, or all of them, together or in sequence. Even as ships caught in a squall, many planes successfully weather the storm, but others, not so successful, fill our accident records."

Judge Strum's dissenting opinion (R. 341-343) very succintly explodes the theory of death by submarine fire or from starvation and exposes the conjecture and speculation on which the verdict rests. As previously stated, the jury did not accept any such theory since its verdict fixing the date of death as of January 24, 1944, is a complete negation of any such theory, the plane having disappeared on January 24, 1943.

In **Goodall Co. v. Sartain,** 141 Fed. 2d 427 (6), the court said:

> "The rights of litigants are not to be determined by mere guess or conjecture."

In **Westland Oil Co. v. Firestone Tire & Rubber Co.,** 143 Fed. 2d 326 (8), the court said:

> "The circumstances must be such as to take the case out of the realm of mere conjecture."

In **Franklin v. Skelly Oil Co.,** 141 Fed. 2d 568 (10), the court held:

> "The verdict of a jury must be based upon something more than mere speculation and conjecture. It is not sufficient to show a set of circumstances bringing the theory of appellants within the realm of possibilities, nor can the theory itself furnish the deficiency; the evidence must bring the theory to the level and dignity of a probable cause."

The opinion in **Pa. R. Co. v. Chamberlain,** 288 U. S. 333, 77 L. Ed. 819, states the general rule.

The decision of the Appellate Court in upholding the verdict is in conflict with the foregoing decisions of the Appellate Courts for the Sixth, Eighth and Tenth Circuits. It is also in conflict with the applicable local decisions.

In **Griffin Lumber Co. v. Harper**, 247 Ala. 616, 25 So. 2d 505, the Court said:

> "Verdicts may not be rested upon pure supposition or speculation, and the jury will not be permitted to merely guess as between a number of causes, where there is no satisfactory foundation in the testimony for the conclusion which they have reached."

In **Atlantic Coast Line Ry. Co. v. Weatherington**, 245 Ala. 313, 16 So. 2d 720, the Court held:

> "A verdict cannot rest on speculation or conjecture."

In **Cannon v. L. & N. R. Co.**, 252 Ala. 571, 42 So. 2d 340, the Court announced the rule, which we submit is here applicable, as follows:

> " 'There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. **On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridicial basis for such a determination,** notwithstanding the existence of other plausible theories with or without support in the evidence.'
>
> "The evidence in this case is without selective application to either of the theories of causation and, therefore, they remain conjectures only. The evidence does not point to any one theory of causation indicating a logical sequence of cause and effect. **Verdicts**

> may not be rested on speculation or conjecture." (Emphasis supplied.)

The evidence here points to and sustains one theory of causation indicating a logical sequence of cause and effect—the loss of this land plane from the peril of the weather on an overseas flight. Everything else is conjecture, surmise, speculation and guess.

(e) **There was error in allowing proof relating to other facts and transactions removed in point of time and occurring under different conditions.**

The Appellate Court in sustaining the trial court has accorded weight to the testimony of Respondent's witnesses Jennings (R. 61-90) and Sensabaugh (R. 128-153). Petitioner submits that same is wholly without weight and should have been stricken (R. 89) and excluded (R. 153).

Witness Jennings was a navigator in the Ferry Division ATC and flew the route from Florida to Trinidad, Natal and Dakar. He related his experiences in making some of these flights (R. 62-68), testifying that he was briefed to stay away from Martinique (R. 67). In the course of relating his experiences and in answer to the question "Go ahead" he stated:

> "Well, the submarines in that area had brought down one plane, the submarine patrol, one B-24, and they would lie on the course, and, of course, an unarmed transport—" (R. 69).

Objections were imposed to this answer. The Court asked the witness approximately what time this happened and the witness answered:

> "Yes, sir. That was between Christmas and New Year's of '42. There was a B-24 on the flight that has got a shell in the nose of the plane at that time while I was on Waller Field, that had gotten back to the base" (R. 69).

The witness was then asked if he knew what course the plane had taken, to which he replied:

> "No, sir. It was flying patrol. It was armed flying patrol."

A motion was then made to exclude the answers the witness had given and the ruling was adverse to Petitioner (R. 69).

Following this the witness gave a review of his experiences while flying a British plane on December 22, 1942—more than a month previous to the disappearance of the plane here involved. He stated that they ran into very bad weather about 2½ hours out of Trinidad (R. 72); that as they approached Trinidad they were right down on the water and had lost one engine and the weather was very bad (R. 74); that their batteries boiled out and ruined their radio; that after traveling westward toward Venezuela they turned back eastward for Bean Field (R. 74), ditched their plane near a small island about 250 to 300 miles from Trinidad (R. 76); that after about a week they were rescued by a B-18 Patrol Bomber (R. 77). In the course of this recitation Respondent's attorney asked the question:

> "I will ask you whether or not in your experience in flying these C-47's you ever saw one of those ships that was beaten down or caused to fall by running into a storm?" (R. 79).

Objections were overruled to this question. On cross-examination the witness stated he did not know what the weather conditions were on January 24, 1943 (R. 85); that there were many planes that flew over that route (R. 87); that he had known of C-47's being lost at sea (R. 87); and that if one of these planes went down at sea it would sink in a matter of minutes (R. 88).

At the conclusion of the witness' testimony Petitioner made a motion to strike (R. 89).

The witness saw the plane on Waller Field, Trinidad, 250 miles from where the insured's plane was last seen. The plane was seen more than a month before and perhaps a year and a month before. The witness' information as to how the plane was damaged was hearsay. He did not know what route it had taken or where it had been. Yet the court let this evidence stand as substantiating Respondent's theory that the C-47 was shot out of the air by a submarine. The witness' experiences while flying the British plane in December, 1942, could have no possible bearing upon the issue of whether the insured escaped to an island. It would be a most violent assumption to say that the elements of nature which beset the British aircraft also beset the C-47. Respondent's witness, Jennings, on cross-examination, stated (R. 85):

> "Q. You don't know what the conditions of the weather were there on January 24, 1943? A. No, sir.
> Q. Were you in that area on January 24, 1943? A. No, sir."

The weather nowhere remains constant for a month and certainly not in the Caribbean. Was the turbulence substantially the same, the wind currents, the barometric pressure? Was this particular C-47 structurally able to stand the storm as was the British plane? Were the pilots equally skilled?

Witness Sensabaugh is a history professor at Birmingham-Southern College (R. 129). He claims to have made a specialty of history of the Latin American countries. He went to Brazil in 1941 (R. 130), and flew back in July, 1942 (R. 133). He attempted to testify as to the political status of the Island of Martinique from 1941 to 1943.

With respect to his flight back he was asked the question, "Was shipping available to come back by ship at that time?" (R. 134). His answer was, "Very little shipping was available, and it was highly dangerous" (R.

134). The Court overruled Petitioner's motion to exclude.

Witness produced upon the trial of the case a book entitled "Naval Operations of World War II," by Samuel Morrison. This volume purported to show the number of ship sinkings in the various submarine areas into which the world was divided (R. 135). Petitioner objected to this type of testimony, but was overruled (R. 136). It specifically objected to the line of questions propounded to the witness as to the number of ship sinkings beginning with the month of June, 1942 (R. 140-141). The witness was permitted to show the number of sinkings in June, 1942, July, August, September, October and November in the various areas. His record did not show any sinkings in the Caribbean area for December, 1942, or the first five months of 1943 (R. 142-145, 152). He knew that submarine sinkings had dropped everywhere in January (1943) (R. 144), and that the submarines may have all been called in (R. 145); that **Dr. Morrison's book did not show that any airplanes were shot down by submarines** (R. 145); that submarines tried to avoid airplanes, which were superior weapons (R. 146); that submarines were more likely to be in the ship passages between the islands unless they were in transit to some other area (R. 149). Petitioner's motion to exclude this witness' testimony was overruled (R. 153).

The witness stated that you were more likely to find submarines down in the southern end of the island chain between the islands (R. 149), particularly around a place like Trinidad (R. 150).

As above stated, insured's plane disappeared more than 250 miles from Trinidad. The conditions under which the submarines would sink ships and under which they would fire upon our planes, if in fact they did, are not shown to be similar and ship sinkings in June, July and August of

1942 would appear to have little connection with what happened to an airplane on January 24, 1943.

The type of evidence above set out demonstrates the extent to which the Trial Court permitted the Respondent to carry her case. The Appellate Court has now sanctioned the actions of the Trial Court. Had there been no objections to the testimony of Jennings, Sensabaugh and Dreyfus, or motions to exclude or to strike, it is submitted that such testimony related to matters that were so remote in point of time, occurring under such different conditions, and so highly speculative as to be without probative value.

The decision of the Appellate Court conflicts with applicable local decisions.

The Alabama Supreme Court in **Sou. R. R. Co. v. Lefan, 195 Ala. 295, 70 So. 249,** stated:

> "To allow such proof it must first be shown **that the conditions were substantially the same** on the two occasions."

In the **L. & N. R. R. Co. v. Finlay,** 237 Ala. 116, 185 So. 904, the court stated that the admissibility of such proof—

> ". . . must rest also upon a showing that conditions were substantially the same."

To like effect **S. H. Kress & Co. v. Barratt,** 226 Ala. 455, 147 So. 386, and **St. Louis-S. F. Ry. Co. v. Curtis,** 216 Ala. 296, 113 So. 254.

The Appellate Court's decision also conflicts with the decision of the Third Circuit.

In **Continental Life Ins. Co. v. Searing,** 240 F. 653 (3rd), the plaintiff brought an action to recover on an insurance policy claiming that the insured had disappeared under conditions of peril at Atlantic City. The Court, though holding that the plaintiff could recover, reversed the case because of the admission of testimony as to other disappearances on the same beach, saying:

"Each case of disappearance has its own individual facts, and affords no controlling precedent for a case of disappearance under different facts . . .

"Evidence was submitted of the disappearance of other persons at Atlantic City. This we think constituted error. Without here discussing each of these cases, and showing how they tended to becloud the issue in this case, we may say that every unexplained disappearance case is of necessity different in some particulars from all others, and none of those so testified to in this case involved any such general, or indeed, special, identity with the present case, as in any way threw any pertinent evidential light on the present issue. Their recital to the jury was, in our judgment, so misleading and prejudicial to the defendants' case that, if for no other reason, the judgment below should be reversed."

(f) **The Appellate Court has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such departure by the Trial Court as to call for this Court's power of supervision.**

The Trial Court allowed proof relating to other facts and transactions where conditions were not substantially the same, and accordingly went completely astray in permitting witness Jennings' and witness Sensabaugh's testimony to remain for the jury's consideration. It erred on the specific questions of admissibility as noted in (e) supra. It erred in giving charges 9 (R. 301) and 15 (R. 302), which were hypothetical directions, and which left the jury to find facts as to which no competent evidence was offered. **McNeil v. Holbrook,** 37 U. S. 84, 9 L. Ed. 1009. **U. S. v. Breitling,** 61 U. S. 252, 15 L. Ed. 900. It erroneously charged the jury orally (R. 203, 205, 210) and in writing (Charge 10, R. 301, Charge 12, R. 302, 217 and Charge 16, R. 303, 219), that death resulting from a hazard

of war while riding in an airplane was excepted from the aviation clause. It entered judgment on a verdict which was based on supposition, surmise, guess, speculation and conjecture. It should have directed a verdict for Petitioner since the testimony and all reasonable inferences which the jury could justifiably draw therefrom was insufficient to support a finding other than for Petitioner. **B. & O. v. Groeger,** 266 U. S. 521, 69 L. Ed. 419; **Pa. Ry. Co. v. Chamberlain,** 288 U. S. 333, 77 L. Ed. 819.

The Appellate Court now sanctions all of these errors. Petitioner submits that this is a case calling for this Court's power of supervision, to the end that justice be done. The argument assigned under (a) through (e) is applicable here and we request the Court to so consider same.

Petitioner most respectfully submits that this application should be granted to the end that the order of dismissal be set aside, the judgment of the Trial Court reversed, a judgment notwithstanding the verdict be entered for Petitioner, or the cause reversed for a new trial.

Respectfully submitted,

Harlan Hobart Grooms

HARLAN HOBART GROOMS,
Counsel for Petitioner.

SPAIN, GILLON, GROOMS &
YOUNG,
Birmingham, Alabama,
Of Counsel.

The undersigned hereby certifies that he has served a copy of the foregoing brief upon the Hon. James A. Simpson, Attorney of Record for the Respondent.

This the 4 day of June, 1952.

Harlan Hobart Grooms

Harlan Hobart Grooms,
Attorney for the Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 119

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Petitioner

vs.

MRS. SELENE R. SMITH

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF

by

JAMES A. SIMPSON, *Attorney for Respondent*

LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF CASE

We here, for the sixth time, again repeat, buttressed now by the holding of the District Court on the trial and on motion for new trial and by the United States Court of Appeals on two applications for rehearing, what petitioner has again been unwilling to put in its "Statement of the Case," viz.:

The evidence in the War Department file indicating that anyone ever saw or knew anything about the course or conduct of the plane carrying assured after it left Puerto Rico for Trinidad is, by the same file sharply and repeat-

edly denied and *put in issue*. Hence, such statements as occur on page 3 of the present petition with reference to the airplane in which assured, deceased, left Puerto Rico, being later seen, viz: " . . . and when last seen was flying at an altitude of eleven hundred feet . . .," and again on page 4 of petition; "It was last seen entering a cloud bank at 14° latitude and 64° longitude . . . two hours and thirty minutes later . . .," and others similar to those in other parts of the petitioner's brief should be recognized *as petitioner's contentions only*, strongly contradicted in its own evidence and now repudiated by the finding of a jury, twice judicially reviewed.

For brevity and saving, may respondent adopt the facts as briefly suggested in the opinions of the Fifth Circuit on the applications for rehearing, (R. 336 and R. 345).

ARGUMENT

The respondent points out:

A. The issue in the case is a plain question of fact.

B. There is no *conflict of law* (federal or otherwise) between the decision below and the decision of the Court of Appeals for the Third Circuit in *Barringer v. Prudential*, 62 Fed. Supp., 286, 153 Fed. 2nd., 224.

C. There is no conflict, certainly in federal law, and it is believed not in local law, between the opinion below and the *Green* case, 144 Fed. 2nd., 55; the *Wilmington Trust* (*DuPont*) case, 177 Fed. 2nd., 404; the *Burns* case, 179 Fed. 2nd., 236; and the *Bischoff* case, 181 Fed. 2nd., 627.

POINT "A"

Throughout the petition and brief in support thereof, petitioner's counsel constantly assumes that the Appellate Court should treat the hypothesis of the facts which he argued to the jury at trial as without dispute in this record.

Statements to support his deductions did occur in the War Department file, but their origin was, for aught that appears, rumor, and they were unsupported and completely denied and contradicted by the most authoritative utterances in the War Department file, viz:

(a). Report of Col. John A. O'Keefe, Morrison Field to The Adjutant General, Washington, dated February 27, 1943, (a month after departure) which said, in part:

> "4. No news or evidence has been received since departure of this particular plane. . . . " (Plaintiff's Exhibit No. 26).

(b). Report of J. A. Ulio, Major General, The Adjutant General, to Mrs. Smith, the widow, dated March 9, 1943, which said:

> "All efforts to locate the missing plane were unsuccessful *and no report as to its location or whereabouts was received after take-off.*" (Page immediately following Plaintiff's Exhibit No. 29, in War Department File). (Emphasis ours).

(c). Report of C. A. Scott, Lt. Col., Investigating Officer, to Headquarters, Commanding Officer, Caribbean Wing, etc., April 26, 1943, which, among other things, said:

> "1. Under Special Orders . . . the undersigned was appointed to investigate and to report on the circumstances and facts leading up to the disappearance of the following named personnel . . . Col. Walter S. Smith.
>
> "2. After a thorough investigation of this matter it was ascertained that the airplane cleared from Borinquen Field, Puerto Rico and did not arrive at its destination, Waller Field, Trinidad, BWI.
>
> "3. *Having discovered nothing more than above in connection with the disappearance of said aircraft this office.* . . . " (Plaintiff's Exhibit No. 32). (Emphasis ours).

(d). References to the fact that no one knows what happened to this plane after it left the Puerto Rico field may be found in other documents in the War Department file, such as, Plaintiff's Exhibit No. 52 and Plaintiff's Exhibit No. 58. It is notable that in the *Barringer* opinion, 62 Fed. Supp., 286, the trial judge said:

> "The plane left the field *and neither it nor any of its occupants have ever been seen or heard of since.*" (Emphasis ours).

(e). The contrary statement in the file that someone had seen this plane after it left Puerto Rico is unsupported by any information as to who this person was; refers to a plane described as C47-NBR 8688 and is signed "Bane" and appears as Plaintiff's Exhibit No. 40. It is not supported by any original document in the file although it is referred to in certain reports; is contradicted by a, b, c, and d above.

Hence, there was a plain issue of fact on all statements like those quoted in "Statement of Case" above, or used in petitioner's petition and brief. No one could be surprised that the jury chose to credit the view of the facts which its verdict adopted.

POINT "B"

The *Barringer* case is not in conflict with the case at bar.

The report of the *Barringer* case, 62 Fed. Supp., 286, contains the following statements:

> "The case was tried in the court without a jury the only evidence being admissions contained in the pleadings and certain statements of fact made by the defendant's counsel which, by agreement, were received as evidence. . . .

" . . . I think this evidence is sufficient to support a finding that the insured's death resulted from riding in an airplane, and I so find. . . ."

Perhaps the evidence in the case at bar would have "supported" a finding of fact, such as was made in the *Barringer* case, but in the case at bar the triers of fact had the War Department file, the testimony of several important witnesses and the proof of death by lapse of time, none of which was before the judge in the *Barringer* case. In the *Barringer* case the fact finder was confronted with facts leading only to the conclusion that the specific peril suggested, caused the death of Barringer. Here the evidence abundantly presented other alternatives. There was no conflict of law, merely a different conclusion of fact on fuller evidence.

POINT "C"

The alleged conflict of this decision with the *Green* Case (First Circuit) 144 Fed. 2nd., 55; the *Wilmington Trust (DuPont)* Case (Sixth Circuit) 179 Fed. 2nd., 236; the *Burns* Case (Sixth Circuit) 179 Fed. 2nd., 236; and the *Bischoff* Case (Dist. of Columbia) 181 Fed. 2nd., 627, does not exist because those cases were, respectively, construing the local laws of Massachusetts, Delaware, Michigan and the District of Columbia (if that jurisdiction may be said to have such), whereas, the case at bar is an application of the laws of Alabama.

The Supreme Court has no duty to attempt to fit into one pattern the local laws of each state. As was said in the *Wilmington Trust Company (DuPont)* Case (Supra) the law of the place of performance (Alabama) governs as to matters of performance of an insurance policy, while the obligations imposed by the policy are governed by the law of the place of contracting.

The petitioner is domiciled in Massachusetts but if the law of that state differs as to the "obligations" of the con-

tract, and if that was of any moment in reaching the Court's conclusion, such was not pointed out at trial nor has it been in this petition.

Furthermore, the Court, in the *Green* Case (Supra), at some length points out that that decision is not in nonconformity with *Bull v. Sun Life* Case, 141 Fed. 2nd., 456. The *Bull* Case is clearly consistent with the case at bar. For the same reason the decision in the *Green* Case would not be in conflict with the decision in the case at bar.

Irrespective of questions of the local law involved, this decision is not, in fact, in conflict with those four cases.

In the *Green* Case (First Circuit), the insured, a naval aviation cadet, made a forced landing of his plane in the sea on account of a snow storm. While the mishap occurred during a naval maneuver, it was not the result of enemy gunfire or action. The court indicated that had enemy action been involved, its holding might have been different. Referring to *Bull v. Sun Life*, (supra) the Court said:

> "We are not inclined to disagree with this case. It may reasonably be said that death by the deliberate act of a third person is not one of the risks ordinarily associated with aerial flight."

In the *Wilmington Trust Company* (*DuPont*) Case (Sixth Circuit), the insured was forced to "bail out" during a glider flight and was killed as the result of the parachute not opening. It was a military flight but no enemy action was involved. The court gave no indication as to what its holding would have been had insured's death resulted from shell fire and not from an ordinary risk of aviation such as storm or mechanical failure.

Furthermore, the opinion, throughout, states that the court was attempting to follow the Delaware law and that, the tendency of Delaware being to follow New York or Massachusetts cases from those jurisdictions were persuasive.

The *Burns* Case (Sixth Circuit) applied an aviation exclusion clause to a case where an airplane exploded in the air, killing all occupants. The real point of the *Burns* Case was the effect of the presence or absence of a war risk clause in a policy containing an aviation exclusion clause. Clearly the explosion of an airplane in flight would be an aviation risk, irrespective of whether it happened on a military or a civil flight.

The *Bischoff* Case (Dist. of Columbia) is by no means contrary to a holding that death, resulting from enemy fire while riding in an airplane is not excluded from coverage because of the aviation clause. In that case, the insured, while on a strafing mission, flew too close to a locomotive and collided with it. The opinion refers to *Boye v. United Services Life Insurance Company*, 168 Fed. 2nd., 570, an earlier decision of the same court. In the *Boye* Case, the plane in which the insured was flying failed to return from a mission over Germany, and it was assumed that it was lost as the result of enemy anti-aircraft fire. The court, reasoning that this was not an ordinary risk of aviation but that the insured's death was the result purely of a war risk, said:

> "We think the case is much the same as if the policy had excluded death 'due to operating or riding in an automobile' and the insured had been killed by gunfire while driving an army car."

The *Bischoff* Case, we submit, did not overrule the *Boye* decision. It held merely that flying too close to a train and striking it with an airplane is an ordinary risk of aviation and within the exclusion clause despite the fact that the insured may be engaged in war at the time.

In the case at bar, the judgment of the Court of Appeals, Fifth Circuit, affirming the judgment of the District Court is based, in part, upon the proposition that the evidence established enough enemy activity in the area traversed by

this plane, including direct evidence of damage to at least one plane by submarine fire, to make it a jury question whether the insurer had met the burden of proof that the plane was lost from causes related to the risks of aviation within the aviation exclusion clause. The concurring opinion of Judge Rives on the first application, and his opinion written for the majority on the second application, placed the court's decision squarely on that basis. The opinion of Judge Holmes on the first application contains the additional hypothesis that plaintiff would not be entitled to recover if the plane "fell, sank, was never heard of, and Colonel Smith made his way to one of the near-by uninhabited islands, where he died of disease or starvation, as Jennings" (a witness testifying to the incident of landing on an out-of-the-way island after being forced off his course by bad weather) "came very near doing."

We do not think that the hypothesis above mentioned is in conflict with the decisions of other circuits; but whether it is or not, is of no moment. *No objection or exception was made or taken on the trial in the District Court* to the court's instruction pertaining to the effect of the possibility of landing upon an island (R. 210).

• • •

Conflict with the *Mandles* Case (Tenth Circuit) 115 Fed. 2nd., 994, is alleged in ground 6 of "Reasons" assigned by petitioner (page 11 of Petition). The *Mandles* Case avowedly deals with the somewhat abstract problem or doctrine of "proximate cause." The *Mandles* Case is made difficult by the rule which makes an act done while insane an accident, while the same act done while sane would be an efficient cause. How far a trier of facts may go back along the chain of the history of an event to ascertain a "direct or indirect" cause is a matter almost of metaphysics. Surely the Supreme Court is under no duty to attempt to reconcile the practice of the Courts of Ala-

bama with those of Colorado (*Mandles* Case) in the application of the "proximate cause" concept.

It seems to be universally agreed that the mere fact that the assured may have ridden to the area of his death in an airplane would not make the airplane ride the *direct* or *indirect cause* of his death any more than a ride to that area on a ship would have made navigation the cause of death. If, having reached the locality, he is then killed by an act of war or other efficient intervening cause, the search for cause of death, either direct or indirect, cannot, practically, be pursued further.

The petition is not supported by a sound "Reason" calling for the exercise of this high Court's power and should be denied.

Respectfully submitted,

James A. Simpson

JAMES A. SIMPSON, *Attorney for Respondent*, MRS. SELENE R. SMITH

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CERTIFICATE OF SERVICE

I, James A. Simpson, Attorney for Respondent in this cause, certify that I have served a true copy of the foregoing Brief upon the Honorable H. H. Grooms, Attorney for Petitioner on this the 17 day of July, 1952.

James A Simpson

JAMES A. SIMPSON, *Attorney for Respondent.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 119.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SELENE R. SMITH,
Respondent.

REJOINDER TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your Petitioner shows unto this Honorable Court as follows:

Points A and B were presented in Petitioner's original brief supporting its Petition for Writ of Certiorari and the arguments there made will not be restated. However, Respondent injects a new matter under Point C. The opinion rendered by the Court of Appeals does not purport to be

grounded on the local decisions of the courts of Alabama. It cites no Alabama cases to that effect. There are no Alabama cases ruling on the issue of whether death resulting from a hazard of war is excepted from the aviation clause. If there were such we could reasonably expect that Respondent would present the same to this Court. Petitioner knows of no presumption to the effect that the Court of Appeals, in deciding a case from a particular State, will be presumed to have applied the law of that particular State. In the absence of a specific ruling that the Court's decision was based upon the law of Alabama or in the absence of a presumption to that effect, Respondent's contention that the proposition referred to is controlled by the local law of Alabama is without merit. Respondent states that the decisions in **Green v. Mutual Benefit Life Insurance Co.**, 144 Fed. 2d 55 (1); **Wilmington Trust Co. v. Mutual Life Insurance Co.**, 76 Fed. Supp. 560, aff. 177 Fed. 2d 404 (3); **Burns v. Mutual Benefit Life Insurance Co.**, 79 Fed. Supp. 847, aff. 179 Fed. 2d 236 (6), and **United Services Life Ins. Co. v. Bischoff**, 181 Fed. 2d 627 (App. D. C.), are based on local law and would have no application to this case. In the **Green case**, a decision of the First Circuit from the District Court of Massachusetts, the Court of Appeals said:

> "In his memorandum the District Judge stated: 'The parties have assumed that they are governed by the law of Massachusetts where the insurance contract became effective by delivery.' **Nothing turns on this**, because it is not suggested that the Massachusetts law contains any principles **or rules of decision different from those generally held to be applicable in the interpretation of an insurance contract of this nature.**" (Emphasis supplied.)

It is noted that the Circuit Court specifically ruled that the matter was to be determined by the general law. In the **Wilmington Trust case**, a decision originating in the Dis-

trict Court of Delaware, the District Court held that the Delaware statute, in making life policies incontestable except for violations of conditions relating to naval and military service, did not nullify a rider excluding aviation risks except those incident to passengers of established air carriers. As to the issue directly under consideration, the Court stated that it did not find a decision on all fours, and that it was faced with the question of determining what a Delaware Court would do, and that the Delaware Court gave considerable weight to the decisions of New York and Massachusetts Courts. The court stated that it found no decisions of the State Courts of Massachusetts, but that the decision of the First Circuit in the **Green** case was helpful. As pointed out, the **Green** case was based on the general law. In the **Burns** case the Court held that under the Michigan Statute the insurer was entitled to make the aviation clause a part of the policy. As to the point directly at issue, the Court's decision is based upon the law generally, as will be observed from page 851 of 79 Fed. Supp., where the Court cites the **Green** case, the **Wilmington Trust** case, **Metropolitan Life Ins. Co. v. Conway**, 252 N. Y. 449, 169 N. E. 642; **Durland v. New York Life Ins. Co.**, 186 Misc. 580, 61 N. Y. S. 2d 700; **Knouse v. Equitable Life Ins. Co.**, 163 Kan. 213, 181 P. 2d 310; **Hyfer v. Metropolitan Life Ins. Co.**, 318 Mass. 175, 61 N. E. 2d 3; **McBride v. Prudential Ins. Co. of America**, 147 Ohio St. 461, 72 N. E. 2d 98; **Thoma v. New York Life Insurance Co.**, 30 North Am. Law Rep., Pa., 369, and the other cases following the general rule. Following these citations the Court said:

> "**In pursuance of the foregoing authorities** the court concludes that the absence of a war-risk exception in the incontestability provision of the policy here in question does not preclude defendant from asserting a defense under the provisions of the aviation clause."

The opinion of the Court of Appeals merely affirms the District Court. In the **United Services v. Bischoff** case the

Appellate Court of the District of Columbia made no effort to try to state what the law in the District of Columbia was, but applied the majority rule prevailing generally.

It is submitted that the conflict between the decision in the instant case and those decisions in the other circuits is a conflict of general law between circuits. There is no local law on the subject and the Court of Appeals did not attempt or purport to apply local decisions.

Respectfully submitted,

HARLAN HOBART GROOMS,
Counsel for Petitioner.

SPAIN, GILLON, GROOMS & YOUNG,
Birmingham, Alabama,
Of Counsel.

The undersigned hereby certifies that he has served a copy of the foregoing brief upon the Hon. James A. Simpson, Attorney of Record for the Respondent.

This the ..16. day of September, 1952.

Harlan Hobart Grooms,
Attorney for the Petitioner.